Supreme Court, U.S.
FILED

011637 MAY -5 2002

OFFICE OF THE CLERK

No. -_____

In The

Supreme Court Of The United States

JESSE HERNANDEZ

Petitioner,

v.

C. A. TERHUNE, DIRECTOR
DEPARTMENT OF CORRECTIONS
STATE OF CALIFORNIA

Respondent .

Petition For A Writ Of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Nicholas De Pento
444 West C Street, Suite 120
San Diego, CA 92101
(619) 236-1151
Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether the rulings of the United States Court of Appeals for the Ninth Circuit, on appeal and on Petition for Rehearing, denied Appellant due process of law in the pursuit of a writ of habeas corpus pursuant to 28 U.S.C. Section 1257.

PARTIES TO THE PROCEEDINGS

The Petitioner is Jesse Hernandez, a state prison inmate incarcerated in the custody of the Department of Corrections for the State of California. Petitioner is an individual and there are no disclosures to be made pursuant to Supreme Court Rule 29b. Respondent is the Director of the Department of Corrections for the State of California, who was the Respondent in all lower court proceedings.

TABLE OF CONTENTS

Page Nos.

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS i

TABLE OF AUTHORITIES ..... iii-iv

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

TEXT OF STATUTES/CONSTITUTIONAL PROVISIONS CITED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 11

1. District and Appellate Court Rulings Herein Effectively and Erroneously Deprived Petitioner of Due Process 11

2. The Question at Issue Merits Supreme Court Review 15

CONCLUSION 16

APPENDIX "A" ..... A-1 to A-10

TABLE OF AUTHORITIES

Page Nos.

Cases:

Harris v. Reed,
489 U.S. 353 (1988) 9, 12, 13

Harris v. Superior Court,
500 F.2d 1124 (9th Cir. 1974) 9, 12

Hunter v. Aispuro,
982 F.2d 344 (9th Cir.) 9, 12, 15

In re Newborn,
53 Cal.3d 786 (1960) 12

In re Panchot,
70 Cal.2d 105 (1968) 12

In re Retchel,
68 Cal.2d 397 1968) 12

Larue v. McCarthuy,
833 F.3d 140 (9th Cir. 1987) 9

Michigan v. Long,
463 U.S. 1032 (1983 ..... 9, 12

Cases (continued): **Page**

Simpson v. Sparkman,
94 F.3d 199 (6th Cir. 1996) 14, 15

Ylst v. Nunnemaker,
501 U.S. 803 ..... 10, 13, 14, 15, 16

U.S. Constitution:

Fifth .Amendment 1
Sixth Amendment 7

Statutes:

28 U.S.C. Section 2253(c)(3) 6
28 U.S.C. Section 2254 ..... 2, 8, 9, 12

OPINIONS BELOW

The rulings of the United States Court of Appeals for the Ninth Circuit, denying Petitioner's Appeal and Petition for Rehearing are included herein at the Appendix, pages A-1 to A-10.

STATEMENT OF JURISDICTION

The United States Court of Appeals entered its order denying rehearing below, and its modification of the original opinion denying appellate relief on January 9, 2002. (Appendix, pages A-5 to A-10). The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

TEXT OF STATUTES/CONSTITUTIONAL PROVISIONS CITED

"No person shall...be deprived of life, liberty or property, without due process of law...."

United States Constitution, Amendment V.

STATEMENT OF THE CASE

This case originated in the Superior Court for the County of San Diego, State of California, in which Court Petitioner was convicted, after jury trial, of willful and premeditated attempted murder, possession of a destructive device, attempted arson, vandalism, and stalking. By its judgment entered on September 9, 1996, the Superior Court sentenced Petitioner to life in prison with the possibility of parole on the attempted murder charge, plus an additional determinate term of four years and four months on the lesser offenses. Petitioner duly appealed to the Court of Appeals of California, alleging in part that he had been deprived of effective assistance of counsel in the trial of the action. Said appeal was denied in its entirety, and an untimely Petition for Review was thereafter presented to the Supreme Court of the State of California. It is undisputed that the Petition for Review was rejected by notice from the Clerk of the California Supreme Court on grounds of untimeliness. In said Petition for review, Petitioner expressly argued that he was denied effective assistance of counsel in the trial of the action.

On April 16, 1999, Appellant filed a Petition for Habeas Corpus Relief in the District Court for the Southern District of California, pursuant to 28 U.S.C. Section 2254. Said Petition was denied without prejudice on May 4, 1999, based upon the Court's conclusion that Appellant had failed to allege exhaustion of state judicial remedies.

On July 7, 1999, Appellant filed an Amended Petition for Habeas Corpus Relief. As a consequence, the District Court filed its order reopening the case and setting a briefing schedule.

On December 3, 1999, Magistrate Judge John A. Houston filed a Report and Recommendation, concluding that habeas relief should be denied. Petitioner's objections to the Report and Recommendation were filed on December 30, 1999.

On September 1, 2000, the District Court entered its judgment adopting the Report and Recommendation of the Magistrate.

On September 29, 2000, Appellant filed an Application for Certificate of Appealability. On October 3, 2000, the District Court granted said certificate.

Appellant's initial Writ Petition in April 1999 alleged that he had been deprived of effective assistance of counsel in a state criminal proceeding, both at the trial and appellate levels. The contention as to trial counsel was that Appellant's jury trial was marred by ineffective assistance in the form of trial counsel's failure to object to the introduction of inflammatory "other act" evidence, and counsel's failure to seek severance of counts not properly joined for trial.

With respect to appellate counsel, Petitioner alleged ineffective assistance by way of counsel's failure to file a timely petition for review in the California Supreme Court.

The District Court denied Appellant's initial Petition on May 4, 1999, on the stated grounds that:

> ...Petitioner has not indicated he has exhausted state judicial remedies. Although Petitioner alleges he filed a Petition for Review in the California Supreme Court, he states that it was denied as untimely. Thus, it appears Petitioner has not given the California Supreme Court a fair opportunity to rule on the merits of the claims contained in his Petition. Petitioner has the ability to file a habeas petition with the California Supreme Court.

By virtue of the above holding, the District Court denied the initial Petition without prejudice, and instructed Petitioner to file a First Amended Petition on or before July 7, 1999.

Petitioner submitted an Amended Petition on July 7, 1999, in which it was noted that Petitioner had submitted a Petition for Habeas Corpus Relief in the California Supreme Court on July 2, 1999. The state Supreme Court Petition sought relief in the form of consideration on the

merits of Appellant's substantive ineffective assistance claims re trial proceedings.

Upon the filing of the Amended Habeas Petition in the District Court, the Court reopened the case, and ordered the Respondent to file a responsive pleading. In that order, the District Court offered two options to Respondent. If it was to be asserted that the Petitioner's claims were procedurally barred for any reason, Respondent was to file a motion to dismiss which was not to address the substantive merits of the claim. If Respondent determined that the Petition should be considered on the merits, it was to file an answer with supporting documentation.

On September 15, 1999, Respondent filed a Motion to Dismiss the second Section 2254 Petition, based on the claim that (1) Petitioner's state Supreme Court habeas action was still pending, and (2) Petitioner's Supreme Court Habeas Petition did not call upon the state tribunal to decide the underlying claims of ineffective assistance at trial, which were the central issues in the case.

On October 18, 1999, Petitioner filed a Memorandum of Law in Opposition to the above contentions, which Memorandum noted that on September 29, 1999, the California Supreme Court had denied Appellant's Habeas Petition without comment.

After consideration of all the pleadings filed by the parties, on December 3, 1999, Magistrate Judge John A. Houston issued a Report and Recommendation that the

Amended 2254 Petition be denied, on the ground that "...the California Supreme Court has not had the opportunity to decide the merits of petitioner's instant claims of ineffective assistance of counsel at trial....Therefore, petitioner's instant claims remain unexhausted...."

Petitioner filed objections to the Magistrate's Report on December 30, 1999, and on September 1, 2000, the District Court issued its order adopting the Report and Recommendation. The central basis of the District Court's ruling was the concept that ineffective assistance of appellate counsel is not sufficient cause to excuse procedural default on the state level, for purposes of a viable Section 2254 petition.

Appellant submitted an Application for a Certificate of Appealability in the matter, which Petition was granted on October 3, 2000. The language of the order indicates that the District Court intended to limit the issue on appeal to whether exhaustion of the claim of ineffective appellate assistance constitutes "the cause showing necessary to excuse a procedural default." The District Court is empowered to limit the scope of appealable issues pursuant to 28 U.S.C. 2253(c)(3).

Petitioner pursued his appeal from the denial of habeas relief in the District Court, and on November 20, 2001, the Ninth Circuit Court of Appeals filed its memorandum decision denying the appeal. (Appendix, pages A-1 to A-4.) The central ruling in the denial of the

appeal was that ineffective assistance of appellate counsel does not amount to a cognizable violation of the Sixth Amendment to the United States Constitution. Accordingly, the Court held that any error of appellate counsel that led to a default in the state court cannot constitute cause to excuse the procedural default in federal habeas proceedings.

On or about December 3, 2001, Petitioner sought rehearing before the Ninth Circuit Court of Appeals, noting that the Court's memorandum contained the following pertinent conclusions:

> Although we find that Hernandez has now sufficiently exhausted all of his claims, we affirm the dismissal on the grounds of procedural default.
>
> (Appendix, page A-2.)

> (Appellant's habeas petition to the California Supreme Court) seeking consideration of his original petition for review because of the ineffective assistance of appellate counsel . . . sufficiently exhausted his claims of ineffective assistance of <u>both</u> trial and appellate counsel.
>
> (Appendix, page A-2.)

> Hernandez's ineffective assistance of trial counsel claim is now procedurally barred because the California Supreme Court refused to address the claims in Hernandez's petition for review on the grounds that it was filed late.
>
> (Appendix, page 2)

While the facts underlying the Court's analysis were correct, counsel submitted that the Court's opinion overlooked an entire body of law cited by Petitioner with respect to proper interpretation of unexplained denial of habeas relief by state tribunals, including the California Supreme Court. The underlying Petitioner's contentions consisted in the assertion that the state Supreme Court's unexplained denial of the habeas corpus remedy could have arisen from at least two distinct rationales. The denial may have been based upon a conclusion that Petitioner could not constitutionally claim ineffective assistance of appellate counsel as to the late Petition for Review, or it could have been based on a conclusion that the underlying claim of ineffective assistance at trial was simply not meritorious. The critical point is that the basis of the habeas denial cannot be determined from the bare and unexplained order of the state Supreme Court.

Petitioner's appellate pleadings noted that it has been held that a federal constitutional claim may be barred from consideration in a Section 2254 proceeding if, and only if, the final state court dispositional order contains a "plain statement that its decision rests upon adequate and

independent state grounds." Michigan v. Long, 463 U.S. 1032, 1042 (1983); Harris v. Reed, 489 U.S. 353, 361 (1988).The Appellate Court, in Hunter v. Aispuro,982 F.2d 344 (9th Cir. 1992), had occasion to apply this principle in the face of a bare denial of habeas corpus relief by state tribunals, in the context of argument raised before the state courts that the issues raised in the state habeas petition had been previously waived. The question before the court in the Hunter decision was whether the bare denial of relief in the state courts rested upon an adequate and independent state ground, i.e., waiver. Noting the requirement in Harris v. Reed, that the final state dispositional order must articulate an independent state ground for denial of relief, the Hunter court, at page 347, held that in denying relief under Section 2254, the District Court is obliged to determine "whether the Supreme Court actually relied on the procedural bar." No such specific determination appears in the District Court habeas ruling herein Moreover, the Hunter court, at page 348, rested its findings upon an earlier Ninth Circuit case, Harris v. Superior Court, 500 F.2d 1124, 1127-29 (9th Cir. 1974), in which it was held that where the California Supreme court follows its usual practice of bare denials of habeas relief, the federal tribunal will presume that the denial was on the merits of the underlying constitutional claims. See also, Larue v. McCarthy, 833 F.3d 140, 143 (9th Cir. 1987).

None of the foregoing principles were addressed in the Appellate Court's unpublished opinion, and counsel respectfully submitted that they should be taken into consideration.

In response to Petitioner's request for rehearing, on January 9, 2002, the Ninth Circuit issued its order denying rehearing and amending the memorandum opinion to include the following paragraph:

> "Assuming that the California Supreme Court's bare denial of the habeas petition addressed the ineffective assistance of trial counsel claim, we must presume that the rejection of that claim on habeas review was also on procedural grounds. The last reasoned state decision on the ineffective assistance of trial counsel claim was the California Supreme Court's denial on direct appeal on the explicitly procedural ground that the petition for review was filed late. Because 'the last reasoned opinion explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard the bar and consider the merits.' Ylst v. Nunnemaker , 501 U.S. at 803."
>
> (Appendix, page s A-5 to A-6)

It was presumably on the basis of the added paragraph that the Ninth Circuit rejected the Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

1. District and Appellate Court Rulings Herein Effectively and Erroneously Deprived Petitioner of Due Process.

Counsel for Petitioner respectfully submits that the instant case represents a situation where a life-sentence state prisoner has been erroneously denied a hearing on the merits of his federal habeas petition, on the basis of rules of law announced by this Honorable Court in the handling of claimed procedural defaults in the pursuit of state remedies. In addition, the rulings of the Ninth Circuit herein are contrary to settled precedent within that Circuit.

As noted in the Statement of the Case, the central judicial events at issue consist of the denial of direct appellate review by the California Supreme Court, on untimeliness grounds, and a subsequent bare denial of habeas corpus relief in that Court without a statement of reasons. It must be reemphasized that in the Petition for Habeas Relief in the California Supreme Court, Petitioner expressly referenced the prior denial of habeas relief in the Federal District Court, and that Court's assertion that habeas relief was still available in the state system. Moreover, the habeas petition to the California Supreme Court specifically argued that Petitioner had been deprived of effective assistance at both the trial and appellate levels, and noted that the state Supreme Court is vested with

absolute discretion in deciding whether to accept a case for determination on the merits. In Petitioner's Request for Rehearing in the Ninth Circuit, it was noted that under California law, the state Supreme Court is vested with power to extend habeas corpus relief despite the fact that the particular case in question may be procedurally flawed. In re Newborn, 53 Cal.3d 786, 789 (1960); In re Panchot, 70 Cal.2d 105, 107 (1968); In re Retchel, 68 Cal.2d 397, 399, n.4 (1968).

Because the state Supreme Court was in fact vested with discretion to entertain Petitioner's habeas trial claims on the merits, Petitioner argued that the bare denial of relief cannot be presumed to have been based on the procedural default. The Petitioner further cited this Honorable Court's ruling to the effect that a federal constitutional claim may be barred from consideration in a Section 2254 proceeding only if the final state dispositional order contains a "plain statement" that its decision rests upon adequate and independent state grounds. Michigan v. Long, supra; Harris v. Reed, supra. There is no such "plain statement" attendant upon the state Supreme Court's bare denial of habeas relief.

Even under applicable Ninth Circuit precedent, it is held that a bare denial of habeas relief by the California Supreme Court will generate a presumption that the denial was on the merits of the underlying constitutional claims. See Hunter v. Aispuro, 982 F.2d 344, 347 (9th Cir. 1992); Harris v. Superior Court, 500 F.2d 1124, 1127-29 (9th Cir. 1974).

Upon the Petitioner's request for rehearing, the Ninth Circuit amended its memorandum opinion to hold that where the last "reasoned opinion" denying state relief rested upon procedural default, the Court must presume that any later denial of the claim likewise rested upon the procedural bar. The court cited Ylst v. Nunnemaker, 501 U.S. 797 (1990) for this proposition. Ylst involved a state prisoner who alleged Miranda violations and ineffective assistance of counsel at the trial level. The state Court of Appeal rejected the appeal on the sole ground that Miranda claim was waived by failure to object at trial. The state Supreme Court rejected discretionary review. The defendant then sought habeas relief in all three levels of the state courts, culminating in a denial of relief by the state Supreme Court on the ground that contentions raised on direct appeal may not be relitigated on habeas corpus. A second petition for habeas relief in the state Supreme Court was rejected without comment.

In defendant's federal habeas petition, relief was denied because (1) the Miranda issue was barred by the previous waiver ruling, and (2) the ineffective assistance claim was denied on the merits. The defendant then appealed to the Ninth Circuit, which held that the ineffective assistance claim was meritless, but that the Miranda claim was still viable because the last state Supreme Court habeas ruling was silent on the waiver ruling made by the Appellate Court, citing Harris v. Reed, supra.

In resolving this procedural conundrum, this Honorable Court announced a rule of "looking through" the last silent state court ruling, to the last explained state court judgment on the constitutional claim at issue. In Ylst, it was the state appellate opinion holding that the Miranda claim was waived at trial. Such "waiver" was an independent state ground barring federal review.

Ylst is factually inapposite for at least two reasons. First, Ylst at page 806 noted that the denial of discretionary review by the state Supreme Court "is not even a judgment," and thus the state appellate opinion was the controlling explained judgment.

In the instant case, Petitioner's claim of ineffective assistance at trial was addressed and denied on the merits at the state appellate level. Consequently, the denial of discretionary Supreme Court review and the bare denial of state Supreme Court habeas relief do not constitute the last "reasoned opinion" on the constitutional issue of ineffective assistance at trial. The Ylst opinion has consistently been cited for the proposition that when there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment are presumed to rest upon the same ground. See Simpson v. Sparkman , 94 F.3d 199, 262 (6th Cir. 1996). The state Supreme Court bare denial of habeas relief herein meets the foregoing description.

Finally, it must be noted that there is an inherent tension between Ylst and the settled Ninth Circuit rule that a bare denial of relief by the state court of last resort will be presumed to be on the merits of the federal claim. Hunter v. Aispuro, supra. Hunter ultimately rests upon the proposition that the California Supreme Court had continued its practice of bare habeas denials after 20 years of notice that the Ninth Circuit viewed these dispositions as being on the merits. Hunter, supra, at 347-48. The Ylst analysis was distinguished in Hunter, at page 347, because no reasoned state opinion existed denying the federal claim on the merits. That is not the case herein.

2. The Question at Issue Merits Supreme Court review.

By this petition, counsel respectfully submits that the Ylst opinion does not address nor justify the denial of this Petitioner's access to federal review of his conviction. There was a reasoned state judgment at the appellate level rejecting Petitioner's constitutional claims, and the state Supreme Court denial of Petitioner's habeas petition adds nothing to the calculus of "reasoned judgment."

Other defendants in Petitioner's position can be denied access to the federal court despite the still existing presumption in Hunter v. Aispuro, supra. At least one circuit has declined to adopt the Hunter presumption. Simpson v. Sparkman, 94 F.3d 199, 203 fn. 1 (6th Cir. 1996).

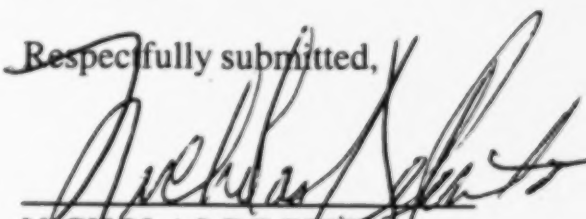
Counsel respectfully submits that there still remains confusion and split of authority on the proper application of the Ylst analysis, and that this case presents critical issues on the right of access to federal habeas corpus relief.

CONCLUSION

By virtue of the foregoing considerations, counsel for Petitioner respectfully submits that this matter merits review by this Honorable Court, and that the ruling of the Ninth Circuit barring Petitioner's access to federal review of his case should be vacated and set aside.

Date: April 3, 2002

Respectfully submitted,



NICHOLAS DE PENTO
Attorney for Petitioner

APPENDIX

FILED
NOV 20 2001
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 00-56710
D.C. NO. CV-99-08725-DT(E)

MEMORANDUM*

JESSE DALE HERNANDEZ,
Petitioner-Appellant,

v.

A. TERHUNE, Director of the California Department of Corrections; DEPARTMENT OF CORRECTIONS
Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of California
M. James Lorenz, District Judge, Presiding

Argued and Submitted September 14, 2001
Pasadena, California

Before: B. FLETCHER, T.G. NELSON and BERZON, Circuit Judges.

* This disposition is inappropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Jesse Hernandez appeals the district court's denial and dismissal without prejudice of his petition for habeas corpus. We affirm. Because the parties are familiar with the facts, we recount them only as necessary to explain our decision. Although we find that Hernandez has no sufficiently exhausted all of his claims, we affirm the dismissal on the grounds of procedural default.

1. Hernandez claimed ineffective assistance of appellate counsel in his habeas petition to the California Supreme Court. Although he did not directly claim ineffective assistance of trial counsel in that petition, his argument seeking consideration of his original petition for review because of the ineffective assistance of appellate counsel in filing the petition late sufficiently exhausted his claims of ineffective assistance of both trial and appellate counsel.

Moreover, exhaustion is satisfied "if it is clear that the claims are now procedurally barred under [state] law." Gray v. Netherland, 518 U.S. 152, 162 (1996). Hernandez' ineffective assistance of trial counsel claim is now procedurally barred, because the California Supreme Court refused to address the claims in Hernandez' petition for review on the grounds that it was filed late.

2. Although Hernandez' claims are now exhausted, "the procedural bar that gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner

can demonstrate cause and prejudice for the default." Gray, 518 U.S. at 162. Hernandez contends that the late filing resulted from an error by his appellate counsel that amounted to ineffective assistance. As a result of the alleged ineffective assistance of his appellate counsel, Hernandez claims that we should find cause to excuse his procedural default and reach the merits of the claims in his federal habeas petition.

Counsel's act or omission will not establish cause for procedural default unless it constitutes ineffective assistance under the Sixth Amendment. Murray v. Carrier, 477 U.S. 478, 487-88 (1986). There is no constitutional right to counsel on discretionary appeals, see Ross v. Moffitt, 417 U.S. 600, 610-11 (1974), and thus retained counsel's ineffective assistance provided on a discretionary appeal does not amount to a violation of the Sixth Amendment, see Wainwright v. Torna, 455 U.S. 586, 587 (1982) (finding no ineffective assistance where counsel failed to file a timely application for certiorari to the state supreme court because there is no constitutional right to counsel to pursue discretionary state appeals). For this reason, there is no merit to Hernandez's ineffective assistance of appellate counsel claim, and any error of appellate counsel that led to default of Hernandez' claims in state court cannot constitute cause to excuse the procedural default in federal habeas proceedings. See Coleman v. Thompson, 501 U.S. 722, 757 (1991). Thus, Hernandez has failed to show cause to excuse the procedural default on his ineffective assistance of trial counsel claim, and the district court properly dismissed his

habeas petition.

The decision of the district court is AFFIRMED.

FILED
JAN 09 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 00-56710
D.C. NO. CV-99-08725-DT(E)

ORDER DENYING PETITION FOR REHEARING, REJECTING THE SUGGESTION FOR REHEARING EN BANC, AND AMENDING THE MEMORANDUM DISPOSITION

JESSE DALE HERNANDEZ,
Petitioner-Appellant,

v.

A. TERHUNE, Director of the California Department of Corrections; DEPARTMENT OF CORRECTIONS
Respondents-Appellees.

Before: B. FLETCHER, T.G. NELSON AND BERZON, Circuit Judges.

The Memorandum Disposition filed on November 20, 2001, is amended as follows:

After the paragraph on page 2 ending with "on the grounds that it was filed late' add a paragraph that reads:

> "Assuming that the California Supreme Court's bare denial of the habeas petition addressed the ineffective assistance of trial counsel claim, we must presume that the rejection of that claim on habeas review was also on procedural grounds.

> The last reasoned state decision on the ineffective assistance of trial counsel claim was the California Supreme Court's denial on direct appeal on the explicitly procedural ground that the petition for review was filed late. Because "the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard the bar and consider the merits." Ylst v. Nunnemaker, 501 U.S. at 803. The Supreme Court's bare denial of the habeas petition therefore does not alter our conclusion that the ineffective assistance of trial counsel claim is procedurally barred."

With this amendment, Judges T.G. Nelson and Berzon have voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc, and Judge B. Fletcher so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed.R.App.P.35.

The petition for hearing is denied and the suggestion for rehearing en banc is REJECTED.

FILED
JAN 09 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 00-56710
D.C. NO. CV-99-08725-DT(E)

AMENDED MEMORANDUM*

JESSE DALE HERNANDEZ,
Petitioner-Appellant,

v.

A. TERHUNE, Director of the California Department of Corrections; DEPARTMENT OF CORRECTIONS
Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of California
M. James Lorenz, District Judge, Presiding

Argued and Submitted September 14, 2001
Pasadena, California

Before: B. FLETCHER, T.G. NELSON and BERZON, Circuit Judges.

* This disposition is inappropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Jesse Hernandez appeals the district court's denial and dismissal without prejudice of his petition for habeas corpus. We affirm. Because the parties are familiar with the facts, we recount them only as necessary to explain our decision. Although we find that Hernandez has now sufficiently exhausted all of his claims, we affirm the dismissal on the grounds of procedural default.

1. Hernandez claimed ineffective assistance of appellate counsel in his habeas petition to the California Supreme Court. Although he did not directly claim ineffective assistance of trial counsel in that petition, his argument seeking consideration of his original petition for review because of the ineffective assistance of appellate counsel in filing the petition late sufficiently exhausted his claims of ineffective assistance of both trial and appellate counsel.

Moreover, exhaustion is satisfied "if it is clear that the claims are now procedurally barred under [state] law." Gray v. Netherland, 518 U.S. 152, 162 (1996). Hernandez's ineffective assistance of trial counsel claim is now procedurally barred, because the California Supreme Court refused to address the claims in Hernandez' petition for review on the grounds that it was filed late.

Assuming that the California Supreme Court's bare denial of the habeas petition addressed the ineffective assistance of trial counsel claim, we must presume that the rejection of that claim on habeas review was also on procedural grounds. The last reasoned state decision on the ineffective assistance of *trial* counsel claim was the California Supreme Court's denial on direct appeal on the explicitly procedural ground that the petition for review was filed late. Because "the last reasoned opinion on the

claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard the bar and consider the merits." Ylst v. Nunnemaker, 501 U.S. at 803. The Supreme Court's bare denial of the habeas petition therefore does not alter our conclusion that the ineffective assistance of trial counsel claim is procedurally barred.

2. Although Hernandez's claims are now exhausted, "the procedural bar that gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default." Gray, 518 U.S. at 162. Hernandez contends that the late filing resulted from an error by his appellate counsel that amounted to ineffective assistance. As a result of the alleged ineffective assistance of his appellate counsel, Hernandez claims that we should find cause to excuse his procedural default and reach the merits of the claims in his federal habeas petition.

Counsel's act or omission will not establish cause for procedural default unless it constitutes ineffective assistance under the Sixth Amendment. Murray v. Carrier, 477 U.S. 478, 487-88 (1986). There is no constitutional right to counsel on discretionary appeals, see Ross v. Moffitt, 417 U.S. 600, 610-11 (1974), and thus retained counsel's ineffective assistance provided on a discretionary appeal does not amount to a violation of the Sixth Amendment, see Wainwright v. Torna,455 Y,S, 586, 587 (1982) (finding no ineffective assistance where counsel failed to file a timely application for certiorari to the state supreme court because there is no constitutional right to counsel to pursue discretionary state appeals). For this

reason, there is no merit to Hernandez's ineffective assistance of appellate counsel claim, and any error of appellate counsel that led to default of Hernandez's claims in state court cannot constitute cause to excuse the procedural default in federal habeas proceedings. See Coleman v. Thompson, 501 U.S. 722, 757 (1991). Thus, Hernandez has failed to show cause to excuse the procedural default on his ineffective assistance of trial counsel claim, and the district court properly dismissed his habeas petition.

The decision of the district court is AFFIRMED.